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In the Supreme Court of the United States

OCTOBER TERM, 1987

JIM JONES,
Superintendent, Missouri Training Center for Men,
Petitioner,

vs.

GERALD DUANE GARRETT,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

I.

Whether respondent was denied rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution when the trial prosecutor volunteered some of his racially neutral reasons for using three peremptory strikes to exclude three black venirepersons from the petit jury panel.

II.

Whether the lower federal courts have correctly utilized the fact-finding process by failing to enforce the statutory presumption of correctness for factual findings or, alternatively, by failing to order an evidentiary hearing.

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No. 87-

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (App. A17) is reported at 815 F.2d 509. The order denying petitioner's motion for rehearing or rehearing en banc is unreported and appears in the appendix of this petition (App. A31). The order of the United States District Court for the Eastern District of Missouri is unreported and appears in the appendix of this petition (App. A16). The Report and Recommendation of the United States Magistrate is also unreported and appears in the appendix (App. A1).

JURISDICTION

The United States Court of Appeals' opinion was issued on April 3, 1987. Petitioner's timely petition for rehearing/rehearing en banc was denied on May 29, 1987 (App. A31). Pursuant to 28 U.S.C. §2101(c) and Supreme Court Rule 20, the present petition for a writ of certiorari was required to be filed within ninety (90) days of the denial of rehearing. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

RELEVANT CONSTITUTIONAL PROVISION

1. Section 1 of the Fourteenth Amendment to the United States Constitution:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Respondent, Gerald Duane Garrett, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254 on January 22, 1985, in the United States District Court for the Eastern District of Missouri. On February 25, 1985, petitioner filed his response to the United States District Judge Hungate's show-cause order. Following a two-stage evidentiary hearing, Magistrate David Noce filed a Report and Recommendation on December 31, 1985. He found respondent's grounds were without merit and recommended that the petition be denied (App. A1). On March 6, 1986, Judge Hungate adopted the Report and Recommendation of the Magistrate and denied respondent's application for a writ of habeas corpus (App. A16). Respondent filed a notice of appeal to the United States Court of Appeals for the Eighth Circuit.

On April 3, 1987, the Court of Appeals reversed and remanded the case. Judge Arnold (writing for himself), Judge Lay and Judge Heaney found that the prosecutor of petitioner's trial violated petitioner's equal protection rights through his use of peremptory strikes. The court found that the prosecutor's stated reasons for excluding black prospective jurors was a pretext for racial discrimination. Following the court's denial of petitioner's petition for rehearing/rehearing en banc, this petition for a writ of certiorari ensues.

To understand the holding of the Court of Appeals and the flaw of its holding, it is necessary to have a brief understanding of the proceedings in state court and respondent's crime. Respondent was charged by indictment with the murder of Agnes Grote. The cause was heard on May 12-19, 1980, before the Honorable Ninian M.

Edwards, in the St. Louis County Circuit Court. After a lengthy voir dire examination of prospective jurors, the prosecutor used three of his peremptory challenges to exclude three black venirepersons from the petit jury panel. The defense moved for a mistrial on the ground that the prosecutor's decision to strike those three jurors was based on improper racial considerations. The prosecutor volunteered:

> I think the record should reflect the fact that the three jurors were black was not my reason for striking them, but, instead, it was the background, education and knowledge to understand fairly sophisticated scientific evidence which I intend to bring to the jury in this case.

[App. A33; Tr. 295.] The trial judge denied the defense motion for mistrial and stated:

> I will deny that motion and deny the other motion—I have no evidence before me to indicate the prosecutor chose to make his challenges except as he thought to be appropriate under all of the facts developed during the voir dire.

[App. A33; Tr. 295.] Following this exchange, evidence was adduced for the jury. This evidence is best summarized by the opinion of the Missouri Supreme Court.

> [Agnes Grote, the victim] was killed on the morning of April 3, 1977. At approximately ten o'clock on that date, a neighbor noticed smoke coming from Mrs. Grote's house. The fire department was called and the fire, which was not too extensive, was extinguished. Her body was discovered underneath a smoldering mattress. An autopsy revealed that death was caused by several violent blows to the head and at least three

stab wounds in the neck. A wooden 2 x 2 inch board, which had been used to brace the house door, was identified as the probable weapon. It was found broken in two near the victim and a fragment from the board was removed from her throat during the autopsy. Although her body had been burned to some extent, the medical examiner determined that death had occurred some hours before the burning. An inspector concluded that the fire had been set deliberately because it had six origins.

The officers observed that a storm door had been removed from its hinges and was hanging from a hydraulic closure; that screwdriver "pry" marks were evident thereon; that glass had been broken from the storm door and a pane of glass, above a deadbolt lock, had been broken on the inner door; that a bootprint made by an "army-style" boot was in the yard near the entrance and a cast was made of it; and that glass fragments and the broken board had been collected.

[Respondent] lived four houses from Mrs. Grote and at the time of her murder was free on bond pending appeal of his conviction for the murder of one Estelle Stern, who had lived several blocks away. Thereafter, the latter conviction was vacated by the Court of Appeals and [respondent] was acquitted on retrial.

Two days after the death of Mrs. Grote, [respondent] was arrested without a warrant at his place of employment and glass fragments [were] removed from the soles of his boots. As the 20-hour "hold" rule approached, a hearing was held wherein the prosecutor's request for an increase of the existing appeal bond in the Stern case was sustained. On the next day, a

search warrant was issued and four screwdrivers were seized at [respondent's] home.

State v. Garrett, 627 S.W.2d 635, 636-637 (Mo. banc 1982), *cert. denied,* 459 U.S. 906, 103 S.Ct. 208, 74 L.Ed.2d 166 (1982).

From this evidence, the jury found respondent guilty of first-degree murder and sentenced him to life imprisonment. *See, id.* at 636. Petitioner presented a variety of issues on direct appeal to the Missouri Supreme Court. *See, id.* That court, however, declined to reverse petitioner's conviction. This Court did not issue a writ of certiorari to the Missouri Supreme Court. *See, Garrett v. Missouri,* 459 U.S. 906, 103 S.Ct. 208, 74 L.Ed.2d 166 (1982). Following the denial of relief on direct appeal, this collateral proceeding occurred.

REASONS FOR GRANTING WRIT

I.

The Court of Appeals' opinion clearly misconstrues *Swain v. Alabama* and its progeny in that the opinion allows the *Swain* presumption that the prosecutor utilized his peremptory challenges for a proper purpose to be eviscerated by a voluntary incomplete explanation of his reasons for the peremptory challenge.

This Court should issue a writ of certiorari in this case due to the important question of federal law and because of the conflict between the Court of Appeals' opinion with other courts' opinions. These concepts will be enhanced in this section.

The Court of Appeals correctly recognized that the prosecutor's use of peremptory strikes was controlled by

the equal protection concepts of *Swain v. Alabama,* 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965). *See, Garrett v. Morris,* 815 F.2d 509, 510 (8th Cir. 1987) (App. A21). This case is not controlled by *Batson v. Kentucky,* ..... U.S. ....., 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), since *Batson* is not to be applied retroactively to a case on federal habeas review. *See, Allen v. Hardy,* ..... U.S. ....., 106 S.Ct. 2878, 92 L.Ed.2d 199 (1986).

The correct standard of proof under *Swain* remains an important issue despite this Court's decision in *Batson.* Since *Batson* is not retroactive, there are numerous cases, both federal and state, that still fall under *Swain* analysis. These cases include death penalty cases. *See, e.g., Lindsey v. Smith,* 820 F.2d 1137, 1145-1146 (11th Cir. 1987). Burdens of proof under *Swain* remain important issues. Supreme Court Rule 17.1.

The Court of Appeals' opinion in this case is wrong. The court held that the *Swain* presumption that the prosecutor was using his peremptory strikes in a proper fashion eviscerated when the prosecutor volunteered part of his reasons for his strikes.

> The decision in *Swain* does not completely insulate a prosecutor's use of peremptory challenges in a given case. Although the Supreme Court declined to require an inquiry into a prosecutor's decision to remove blacks from a particular jury, we believe that where, as here, the prosecutor volunteers the reasons for his actions and makes them part of the record, he opens the issue up for review. The record is then no longer limited solely to proof that the prosecutor has used his peremptory challenges to strike all black jurors from the defendant's jury panel, and the presumption that the prosecutor has acted properly falls

> away. At that point, the court has a duty to satisfy itself that the prosecutor's challenges were based on constitutionally permissible trial-related considerations, and that the proffered reasons are genuine ones, and not merely a pretext for discrimination.

Garrett v. Morris, 815 F.2d at 511 (App. A23). This analysis is incorrect under federal law. Proper analysis would require the volunteered reasons to be considered in addition to the *Swain* presumption. The presumption should not deteriorate upon the prosecutor's gratuitous comment.

If the Court of Appeals' statement of the law were correct, then incongruous situations would develop. A hypothetical situation illustrates. Under the Court of Appeals' analysis, a prosecutor could have racially impermissible reasons for his strikes. If the prosecutor were to say nothing, his strikes are immune from review. If, on the other hand, the prosecutor were to say anything, review could occur. Petitioner does not believe that the law turns upon such an arbitrary detail. The Nevada Supreme Court stated this principle simply:

> If the nature of the motive underlying a peremptory challenge is deemed to affect due process or fundamental fairness, then the reviewability of motives should not depend upon such vagaries as whether the prosecutor happened to place his motives on the record. Such a policy would allow a substantive right to be frustrated by mere silence or the refusal to cooperate.

Nevius v. State, 699 P.2d 1053, 1059 n. 3 (Nev. 1985).

The Court of Appeals cites several cases to support its theory. Those cases only demonstrate the arbitrary

nature of the Court of Appeals' standard. In *Weathersby v. Morris*, 708 F.2d 1493 (9th Cir. 1983), *cert. denied*, 464 U.S. 1046, 104 S.Ct. 719, 79 L.Ed.2d 181 (1984), the prosecutor used his peremptory challenges to exclude all black persons from the panel. In *United States v. Greene*, 626 F.2d 75 (8th Cir.), *cert. denied*, 449 U.S. 876, 101 S.Ct. 220, 66 L.Ed.2d 98 (1980), the prosecutor used five of his six challenges to remove all prospective black jurors from the panel. In *United States v. Boykin*, 679 F.2d 1240 (8th Cir. 1982), the prosecutor challenged the only two blacks on the panel. In *Weathersby*, the prosecutor volunteered his reasons for exercising his challenges. The Ninth Circuit held that that volunteer stripped the prosecutor of the *Swain* presumption. *See, Weathersby v. Morris*, 708 F.2d at 1495-1496. Accordingly, the court reviewed the prosecutor's motives. In *Greene* and *Boykin*, equally egregious fact patterns, no review occurred because the prosecutors volunteered no information. Such a result is arbitrary and capricious. The Court of Appeals' ruling cannot be a correct interpretation of federal law. The correct interpretation of federal law should allow the prosecutor's voluntary thoughts to be considered with the *Swain* presumption. The validity of the prosecutor's comments should only affect the weight of the evidence in addition to the *Swain* presumption.

Because of the arbitrary nature of the rule articulated by the Court of Appeals, it is not surprising that there are courts that decline to follow the rule. Supreme Court Rule 17.1. The Ninth Circuit, in *Weathersby*, noted the conflict between the courts. *See, Weathersby v. Morris*, 708 F.2d at 1496 n. 2 (*citing, United States v. Danzey*, 476 F.Supp. 1065 (E.D.N.Y. 1979), *aff'd*, 720 F.2d 286 (2nd Cir.), *cert. denied*, 449 U.S. 878, 101 S.Ct. 225, 66 L.Ed.2d 101 (1980)). Since *Weathersby* was decided,

the Indiana Supreme Court applied *Weathersby* without judging whether it was a correct articulation of federal law. *See, Merritt v. State*, 488 N.E.2d 340, 341-342 (Ind. 1986). The Nevada Supreme Court has declined to follow *Weathersby* because it creates an irrational system for determining whether review should occur. *See, Nevius v. State*, 699 P.2d at 1059 n. 3. In fact, that state supreme court requested guidance from this Court as to whether such an arbitrary method should exist. *See, id.*

In light of the divergence of views concerning *Weathersby* during the past three years, guidance is needed from this Court as to its vitality as federal law. This divergence of opinion highlights the significance of the issue. Both capital and noncapital cases continue to grapple with the burdens of proof under *Swain*. Guidance from this Court is necessary to help them fairly resolve those Fourteenth Amendment claims.

II.

The Court of Appeals' opinion employs an improper fact-finding process, failing to enforce the statutory presumption of correctness for factual findings or, alternatively, failing to order an evidentiary hearing to resolve the factual controversy.

The fact-finding procedure of the Court of Appeals is flawed. Obviously, there is a factual controversy between petitioner and respondent. That factual controversy centers upon whether the prosecutor had improper motives for his use of peremptory strikes. This Court recognized that this is a factual issue in its opinion in *Batson v. Kentucky*, ... U.S. ....., 106 S.Ct. 1712, 1724 n. 21, 90 L.Ed.2d 69 (1986), *citing, Anderson v. Bessemer City*, 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985).

The Court of Appeals recognized that the presumption of correctness established in 28 U.S.C. §2254(d) applied to these state court factual findings. *Garrett v. Morris*, 815 F.2d 509, 514 (8th Cir. 1987) (App. A29). *See also, McCray v. Abrams*, 750 F.2d 1113, 1133-1134 (2nd Cir. 1984), *vacated*, ... U.S. ....., 106 S.Ct. 3289, 92 L.Ed.2d 705 (1986). The Court of Appeals, however, declined to apply the presumption of correctness because it found the state court finding not to be fairly supported by the record. *Garrett v. Morris*, 815 F.2d at 514 (App. A29). That ruling by the Court of Appeals is incorrect. This Court has consistently noted the significance of correctly resolving presumption-of-correctness issues. Supreme Court Rule 17.1(c); *see, Kuhlmann v. Wilson*, ... U.S. ....., 106 S.Ct. 2616, 91 L.Ed.2d 364 (1986); *Miller v. Fenton*, ... U.S. ....., 106 S.Ct. 445, 88 L.Ed.2d 405 (1985); *Patton v. Yount*, 467 U.S. 1025, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984); *Rushen v. Spain*, 464 U.S. 114, 104 S.Ct. 453, 78 L.Ed.2d 267 (1983); *Wainwright v. Goode*, 464 U.S. 78, 104 S.Ct. 378, 78 L.Ed.2d 187 (1983); *Maggio v. Fulford*, 462 U.S. 111, 103 S.Ct. 2261, 76 L.Ed. 2d 794 (1983); *Marshall v. Lonberger*, 459 U.S. 422, 103 S.Ct. 843, 74 L.Ed.2d 646 (1983); *Sumner v. Mata*, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981). Given this Court's extensive analysis of the presumption of correctness, there is no doubt that this Court considers it to be a significant issue of federal law.

The issue is also important because this case represents one of the first opportunities this Court has to apply the *Batson* concepts in a habeas corpus case. The Court in *Batson* found a finding of intentional discrimination to be a finding of fact. *Batson v. Kentucky*, 106 S.Ct. at 1724 n. 21. In *Batson*, this Court emphasized the important role of the trial court in determining "if

the defendant has established purposeful discrimination." *Id.* at 1724. To emphasize the trial court's role, the Supreme Court held that the trial court's ruling should be reversed only if it were clearly erroneous. *Id.* at 1724 n. 21.

Similar analysis can also be seen by this Court concerning issues of bias by jurors. In *Darden v. Wainwright,* ..... U.S. ....., 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986), this Court emphasized the unique position of the trial court in determining whether a potential juror was impermissibly biased. *Id.* at 2469. The Court emphasized not only aspects of the record, *i.e.,* the questions and answers during voir dire, but also emphasized that the trial court was aided by the venireperson's demeanor. *See, id.* at 2470. These factors underlie each of the Supreme Court's decisions concerning the presumption of correctness with regard to juror bias. *See, Wainwright v. Witt,* 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d (1985); *Patton v. Yount, supra; Rushen v. Spain, supra.*

The factors underlying the juror bias—presumption-of-correctness cases also exist with the peremptory strike situation. With the peremptory strike situation, both the prosecutor and the judge must listen to, and determine characteristics about, individuals in the venire panel. Likewise, the judge must also view the statements, demeanor and credibility of the prosecutor in reaching his finding that the prosecutor did or did not have an improper motive in making his strikes. Moreover, there is an additional factor inherent to the relationship between the trial judge and the prosecutor. Unlike a venireperson who may be called to serve upon a venire panel only infrequently, the prosecutor must appear before the state trial court virtually on a daily basis. Accordingly, the pros-

ecutor develops a reputation, either good or bad, for his credibility in dealing with the judiciary. This reputation is one of the intangibles, along with demeanor, tone of voice, etc., that the trial court must consider in making its factual finding.

In light of these considerations, the question becomes what constitutes "fair support" for the trial court's implicit factual finding that the prosecutor did not have an impermissible motive for his peremptory strikes. The prosecutor stated:

> I think the record should reflect the fact that the three jurors were black was not my reason for striking them, but, instead, it was the background, education and knowledge to understand fairly sophisticated scientific evidence which I intend to bring to the jury in this case.

[App. A33; Tr. 295.] The Court of Appeals found this statement not to be "fair support" for the state trial court factual finding. *Garrett v. Morris*, 815 F.2d at 514. Petitioner submits this statement, standing alone, constitutes fair support for the state trial court's factual finding. Such simple statements, along with demeanor, tone of voice, phrasing of questions, etc., constitute fair support with the Supreme Court's juror bias cases; thus, this statement, the above-listed characteristics and the prosecutor's reputation should be sufficient to constitute fair support for the trial court's factual finding with this case.

The Court of Appeals performed a detailed examination—an autopsy—upon the prosecutor's reason for the use of the peremptory strikes. *Garrett v. Morris*, 815 F.2d at 513-514 (App. A27-29). Even if the Court of Appeals' examination were correct, it was irrelevant. The fact that

the prosecutor explained some of his reasons for his use of peremptory strikes constitutes fair support for the trial court's factual finding. For the Court of Appeals to reject totally the prosecutor's reasoning is a credibility determination by an appellate court. It is unique that the Court of Appeals found that it had the ability to make such a credibility determination seven (7) years after the trial without having seen the demeanor of the prosecutor or having heard the tone of his voice. The Court of Appeals also does not discuss why it feels that it is in a better position than is the trial court to make that determination of credibility. *See, Anderson v. Bessemer City,* 105 S.Ct. at 1512 (trial court's expertise as fact-finder).

The Court of Appeals' detailed examination into the prosecutor's reasons for his strike is not relevant to the determination that the trial court's factual finding was not fairly supported by the record. The factual finding by the trial court was about **the prosecutor's state of mind.** *Garrett v. Morris,* 815 S.W.2d at 514 (App. A28-29). The trial court's factual finding was that the prosecutor was not using his strikes in a racially motivated manner, not whether the stricken venirepersons had a good or bad education. Whether the stricken venirepersons actually had a good or bad education is irrelevant to the penultimate question, the prosecutor's state of mind. What is relevant is that the prosecutor stated that the venirepersons were stricken because they lacked "background, education and knowledge" to understand the scientific evidence—racially neutral reasons. Nothing in the present record degrades the prosecutor's state of mind at the time he made his strikes. Whether the prosecutor was correct or incorrect in his assessment of the venirepersons' education is irrelevant. The factual finding by the state court of the prosecutor's state of mind is fairly supported by the record.

The Court of Appeals' statement that the reasons volunteered by the prosecutor are not fairly supported by the record is irrelevant. *See, id.* at 514 (App. A29). Because the Court of Appeals' error is an easy error for a court to make and has been made with frequency with post-*Batson* cases, this Court should issue a writ of certiorari in order to consider this important federal question.

Even assuming the presumption of correctness should have been rejected, the fact-finding process in this case remains flawed. Rejection of the presumption of correctness means that there remains a factual controversy between petitioner and respondent that would necessitate an evidentiary hearing. It is apparent that there is a factual controversy between petitioner and respondent concerning the prosecutor's state of mind when he used his peremptory strikes. As discussed earlier, petitioner believes that the factual controversy is resolved through the presumption of correctness, the state trial court's implicit finding that the prosecutor's motives were permissible. When the Court of Appeals disagreed and ruled that the state trial court's factual findings were not fairly supported by the present record, there remained a factual controversy between petitioner and respondent that is not resolved on the current record.

Examination of the affidavit by the prosecutor indicates that a variety of concerns entered the prosecutor's decision about whom to strike (App. A34-35). This affidavit also indicates that the prosecutor did not provide all of the reasons for the trial court's consideration. The prosecutor perceived no need to do so at that time. Accordingly, petitioner submits that the present record is incomplete for the fact-finding that the Court of Appeals did in its opinion. *Garrett v. Morris*, 815 F.2d at 514 (App. A27-29). The case should be remanded for further evi-

dentiary consideration. The fact-finding process in habeas corpus cases is always an important federal question. The Court of Appeals' inability to apply the presumption of correctness or, alternatively, to remand for an evidentiary hearing, requires this Court to issue a writ of certiorari.

CONCLUSION

The petitioner respectfully requests that this petition for a writ of certiorari be granted and that the Court of Appeals' judgment be reversed. Alternatively, he requests that the petition be granted and that full briefing and argument be scheduled.

Respectfully submitted,

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APPENDIX

APPENDIX A

(Filed December 31, 1985)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

GERALD DUANE GARRETT, Petitioner,	)	
v.	)	
TERRY MORRIS, Warden, and ATTORNEY GENERAL OF THE STATE OF MISSOURI, Respondents.	)	No. 85-152 C (3)

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE

This case is before the Court on the petition of Gerald Duane Garrett for a writ of habeas corpus pursuant to 28 U.S.C. §2254. The action was referred to the undersigned United States Magistrate pursuant to 28 U.S.C. §636(b).

Gerald Garrett was convicted in 1980 in the Circuit Court of St. Louis County of first degree murder. He was sentenced to life imprisonment. His conviction was affirmed on direct appeal. *State of Missouri v. Garrett*, 627 S.W.2d 635 (Mo. en banc 1982).

Petitioner raises eight grounds for relief in the instant federal habeas petition. Ground 1 alleges that the state

trial court was without jurisdiction, because the indictment charging him with capital murder failed to allege malice aforethought. Ground 2 alleges that women were systematically excluded from his grand jury pool. Ground 3 alleges that persons between the ages of 21 and 35, persons of lower socio-economic status and non-professionals had been systematically excluded from his grand jury pool. Ground 4 alleges that certain evidence was seized without probable cause and that his motion to suppress it was improperly overruled. Ground 5 alleges that he was deprived of a fair trial when the state was allowed to peremptorily strike all the Negroes from his veniremen panel. Ground 6 alleges that the state failed to make out a submissible case and that his motion for acquittal should have been granted. Ground 7 alleges that he was denied a fair trial because the state used improper argument designed to engender hostility toward him. Ground 8 alleges that he was denied his right to use his peremptory challenges in the selection of his jury.

In his first ground petitioner Garrett contends that he was denied a fair trial and due process of law, because his indictment failed to allege the element of malice aforethought, an element which he contends is essential to a conviction for murder. The legal sufficiency of a state court indictment is not a proper basis for federal habeas corpus relief, unless it is so deficient that it deprives the state court of jurisdiction. *DeBenedictis v. Wainwright*, 674 F.2d 841, 842 (5th Cir. 1982); *Liner v. Phelps*, 731 F.2d 1201 (5th Cir. 1984).

Under Missouri law the test of sufficiency of an indictment is whether it contains all the essential elements of the offense as set out in the statute and clearly apprises defendant of the facts which constitute the offense. *State*

of Missouri v. Gilmore, 650 S.W.2d 627, 628 (Mo. en banc 1983). The statute under which petitioner was indicted provided that a person is guilty of capital murder if he "unlawfully, willfully, knowingly, deliberately, and with premeditation kills or causes the killing of a human being. . . ." §565.001 RSMo. (1975). The indictment used this quoted language with the addition of the word "feloniously." Petitioner's Memorandum, filed January 22, 1985, p. 27. An indictment in the words of the statute is usually sufficient. *State of Missouri v. Hammond*, 571 S.W.2d 114, 116 (Mo. banc 1978). In *State of Missouri v. Downs*, 593 S.W.2d 535, 540 (Mo. 1980), the court held that the words "with malice aforethought", which were included in the indictment in that case, were mere surplusage and the defendant was not prejudiced by their addition. Likewise the absence of that surplusage will not prejudice the defendant. The language of petitioner's indictment informed him of the charges against him. The Supreme Court of Missouri held in petitioner's case that the words of the statute encompassed the concept of malice aforethought. *State of Missouri v. Garrett*, 627 S.W.2d 635, 637 (Mo. en banc 1982). A federal court is bound by the determination by the state's highest court of the meaning and application of a state statute. *Harkins v. Wyrick*, 589 F.2d 387, 391 (8th Cir. 1979). Petitioner's writ cannot be issued on this ground.

Ground two of Garrett's petition alleges that women were systematically excluded from and substantially underrepresented in the pool from which his grand jury was chosen and excluded from service as foreperson of the grand jury. As provided by Missouri law, the Circuit Court judges constituted the county board of jury supervisors. A pool of six hundred names was maintained and periodically replenished on an as needed basis for

possible grand jury service selection. To fill the need for a grand jury, one hundred names were drawn at random from the six hundred name wheel. From this one hundred the judge in charge of the grand jury would select the twelve or so persons who actually constituted the grand jury and would select the jury foreman. *See State of Missouri v. Garrett, supra,* 627 S.W.2d *at* 637-638. In petitioner's case, a quorum of ten grand jurors returned the indictment. (Resp. Exh. A-6, p. 144). Of the ten, one was a black male, four were female, and the foreman was a female. (*Id.*)

The discretion allowed the jury supervisors and the use of the "key-man" system provided an opportunity for discrimination, but that does not necessarily violate a defendant's constitutional right to a trial by a jury that is a fair cross section of the community. *Hernandez v. Texas,* 347 U.S. 475, 478-79 (1953).

The elements of a prima facie case of violation of the fair cross section requirement are:

1. that the group alleged to be excluded is a "distinctive" group in the community;

2. that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and

3. that this underrepresentation is due to systematic exclusion of the group in the jury selection process.

Duren v. Missouri, 439 U.S. 357, 364 (1979); *see also Castaneda v. Partida,* 430 U.S. 482, 494 (1977) (Step two, the underrepresentation on grand juries, must be proved to have existed over a significant period of time.)

Women are a distinctive group in the community. *Id.; Taylor v. Louisiana*, 419 U.S. 522, 531 (1975). Petitioner's prima facie showing, however, fails in the second and third elements. In the state courts petitioner presented expert testimony relating to the number of women in the community. (Resp. Exh. A-6.) It was based in part on estimates of population mix and on extrapolations from national trends and a seven-year old census. (Resp. Exh. A-6, pp. 62-74.) The estimated percentage of women in St. Louis County (52.8%) was compared with the number of women in the grand jury pool for the year 1977 (36.59%). Even accepting the 16.21% difference in these figures in the selection of one grand jury there was insufficient proof that there was a significant systematic exclusion of women from jury pools over a significant period of time. *See Casteneda v. Partida, supra*, 430 U.S. *at* 1977).[1] [sic]

It cannot be said as a matter of law that a pool consisting of 36.59% women is not fair and reasonable in relation to the estimated 52.8% of the community which are women. (Resp. Exh. A-6, p. 49.) In petitioner's grand jury, the number of women (4 of 10) was 1.28 less than the evidenced ideal. In the absense of intentional discrimination, such is an insufficient basis for finding a prima facie case of constitutional deprivation. *Cf., United*

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1. Petitioner adduced evidence that the balance of persons not selected by the presiding circuit judge for service on a grand jury (approximately 100 less the 12, 13 or 14 selected) were placed back into the general jury wheel for possible selection the next time a grand jury is constituted. (Trans. of hearing held on July 29, 1985, pp. 2-8.) Thus, the general wheel pool would be reconstituted over a period of 6 to 12 years on an evolutionary basis. (*Id., at* 6.) There was no evidence of any significant disparity between the relevant population of women and their membership on any other grand jury and there was no evidence that any disparity was systematic over a significant period of time.

States v. McDaniels, 370 F. Supp. 298-303 (E.D.La. 1973), *aff'd sub nom. United States v. Goff*, 509 F.2d 825, 827 (5th Cir. 1975). The statistical significance test results suggested by petitioner's expert at the state court hearing were substantially discredited by the witness's testimony that the test's applicability was questionable. (Resp. Exh. A-6, p. 59).

Petitioner also alleges that women were not fairly represented as forepersons of grand juries in St. Louis County. The evidence before the state courts indicated that during the previous sixteen years on forty-eight grand juries one black, three women, and forty-four white males served as grand jurors. *State of Missouri v. Garrett, supra*, 627 S.W.2d *at* 639.

At the outset the Court believes that petitioner lacks standing to complain about any historical underrepresentation of women as grand jury foremen, because the foreman of petitioner's grand jury was a woman. *See United States v. Donohue*, 574 F.Supp. 1269, 1274 n.3 (D. Md. 1983). Petitioner could not have been harmed by any prior underrepresentation.

Further, petitioner has not made a persuasive showing that the historical underrepresentation was the result of a "systematic exclusion" in the selection process. On the other hand, there was testimony by the jury supervisors that there was no systematic exclusion of women as forepersons. Rather, they selected persons best qualified by reliability, conscientiousness, leadership, and experience. (Resp. Exh. A-6, pp. 22, 107, 117-121, 128.) The Missouri Supreme Court held that this evidence was credible. *State of Missouri v. Garrett supra*, 627 S.W.2d *at* 640. That holding is supported by substantial evidence. The petition for habeas corpus relief cannot stand on ground 2.

In his third ground petitioner Garrett asserts that he was denied a fair trial in violation of his Fifth, Sixth, and Fourteenth Amendment rights. He contends that young adults between the ages of 21 and 34, non-professionals, and persons of lower socio-economic status were systematically excluded from grand jury pools in St. Louis County.

An evidentiary hearing was held before the undersigned to determine if persons 21 to 34 years of age are a cognizable class for jury selection purposes.

The District Court for the Southern District of New York in *United States v. Guzman*, 337 F.Supp. 140, 143-144 (S.D. N.Y.), *aff'd* 468 F.2d 1245 (2d Cir. 1972), *cert. denied*, 410 U.S. 937 (1973), set out the generally accepted factors for determining cognizability. They are:

1. The group must have a definite composition.

2. There must be a common thread that runs through the group, a basic similarity in attitudes or ideas or experience which is present in members of the group.

3. The group must have a community of interest which cannot be adequately protected by the rest of the populace.

Id. *See also United States v. Test*, 550 F.2d 577, 591 (10th Cir. 1976).

A number of courts have considered whether young adults, defined in various ways, are a cognizable group. The consensus is that such an age group is not such a cognizable group. *Barber v. Ponte*, 772 F.2d 982, 996-1000 (1st Cir. 1985) (18-34); *Brown v. Harris*, 666 F.2d 782, 783-84 (2d Cir. 1981), *cert. denied*, 456 U.S. 948 (1982) (18-21); *United States v. Gast*, 457 F.2d 141, 142 (7th

Cir.), *cert. denied,* 406 U.S. 969 (1972) (18-26); *Davis v. Greer,* 675 F.2d 141, 146 (7th Cir.), *cert. denied,* 459 U.S. 975 (1982) (18-21); *United States v. DiTommaso,* 405 F.2d 385, 391 (4th Cir. 1986), *cert. denied,* 394 U.S. 934 (1969); *Cox v. Montgomery,* 718 F.2d 1036, 1038 (11th Cir. 1983) (18-30); *United States v. Potter,* 552 F.2d 901, 905 (9th Cir. 1977) (18-34); *United States v. Test,* 550 F.2d 577, 591 (10th Cir. 1976) (21-29); *United States v. Ross,* 468 F.2d 1213, 1217 (9th Cir. 1972), *cert. denied,* 410 U.S. 989 (1973) (21-24); *United States v. Kirk,* 534 F.2d 1262, 1278 (8th Cir. 1976), *cert. denied,* 433 U.S. 907 (1977); *United States v. Olson,* 473 F.2d 686, 688 (8th Cir.), *cert. denied,* 412 U.S. 905 (1973) (18-20); *House v. Balkcom,* 562 F.Supp. 1111, 1150 (N.D. Ga. 1983) (18-21); *United States v. Musto,* 540 F.Supp. 346 (D. N.J. 1982) (18-27); *United States v. Guzman,* 337 F.Supp. 140, 145 (S.D. N.Y. 1972), *aff'd,* 468 F.2d 1245 (2d Cir. 1972), *cert. denied,* 410 U.S. 937 (1973) (18-21).

The United States Supreme Court declined to answer the question in *Hamling v. United States,* 418 U.S. 87 (1974). The Court there noted the lack of success of claims of exclusion of the young and went on to hold that even if the young are an identifiable group they were not discriminated against under the facts of that case. *Id., at* 137.

In the hearing before the undersigned on the matter of cognizability of the age group 21 to 34, petitioner and respondent each presented expert sociologists to testify whether there were similarities in attitudes or a common thread which identified the group of young adults between the ages of 21 and 34. The expert witnesses presented testimony pertaining to sociological studies that noted similarities among persons in certain age groups. They also, however, testified to the fact that there were many differences in attitudes, interests, and behavior among the members of the groups. Their only clear

consensus was that there are differences between people in one stage of life and another stage that are greater than the differences between people in the same life stage. (*See,* Tr. of July, 1985 hearing *at* 51-53.)

The testimony did not persuade that there was any interest of the persons age 21-34 that could not be effectively represented by others. *United States v. Potter,* 552 F.2d 901, 905 (9th Cir. 1977). Further, the experts and the works referred to by them, defined young adults using various age groupings. The difficulty in defining the parameters of the class which is assertedly discriminated against is very apparent. Only an arbitrary definition would limit the subject class to those between the ages of 21 and 34. This is so, because it is not the ages of the class members that are argued to be not represented in the grand jury but the asserted characteristics of persons in such a class. The age boundaries between persons with distinct characteristics are not sufficiently static.[2] *See Barber v. Ponte, supra.*

The undersigned is not convinced by petitioner's evidence that the general rule that age does not define a cognizable class should be rejected. Persons in the age group of 21-34 year olds are not sufficiently similar (and dissimilar from persons in other age groupings) that their exclusion from a jury pool would violate a defendant's right to a fair cross section jury.

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2. Petitioner referred the undersigned to *The Seasons of A Man's Life,* by Daniel J. Levinson (Alfred A. Knopf 1978). This treatise, a valuable study of adult development through the eras of the life cycle, was premised upon a study of 40 men. It postulated a sequence of four eras with consistent 4 or 5 year periods of overlap: 1. childhood and adolescence: age 0-22; 2. early adulthood: age 17-45; 3. middle adulthood: age 40-65; 4. late adulthood: age 60-?. The apparent conclusion is that any definition of the asserted age grouping would be imprecise and arbitrary.

No evidentiary hearing was held on the matter of cognizability of the groups of non-professionals and persons of lower socio-economic status. The court in *United States v. McDaniels*, 370 F.Supp. 298, 307 (E.D. La. 1973), *aff'd sub nom U.S. v. Goff*, 509 F.2d 825 (5th Cir. 1975), refused to recognize economic status as an identifiable class. The court held that it would constitute an arbitrary separation for jury service purposes. Petitioner in this case has not sufficiently defined "lower socio-economic status" and "non-professionals" to allow for further consideration.

In his fourth ground for relief petitioner contends that he was denied his Fourth Amendment right to be free from unreasonable searches and seizures. He contends that his arrest was not based on probable cause.

In *Stone v. Powell*, 428 U.S. 465, 482 (1976), the Supreme Court held that a state prisoner may not be granted federal habeas corpus relief when the state provided him a full and fair opportunity to litigate the constitutionality of his search and seizure. Petitioner contends that the bar provided by *Stone* is not available here, because he was not afforded a full and fair opportunity to litigate his Fourth Amendment challenge in the Supreme Court of Missouri. This Circuit has held that *Stone* applies to bar federal habeas relief even where the defendant did not use the state process. The bar applies if an opportunity is available in the state court. Even if the state court determined the Fourth Amendment claim erroneously, *Stone* bars consideration by the federal court of the claim. *Lenza v. Wyrick*, 665 F.2d 804, 808 (8th Cir. 1981). Petitioner admits that he received an evidentiary hearing in the trial court on his motion to suppress evidence. Memorandum filed Jan-

uary 22, 1985, p. 14. The Missouri Supreme Court assessed the evidence and found probable cause and affirmed the denial of the motion. *State of Missouri v. Garrett, supra,* 627 S.W.2d *at* 641. This ground for relief must be denied.

In his fifth ground petitioner claims that the prosecutor's use of peremptory challenges to exclude black jurors from his petit jury panel violated his Sixth and Fourteenth Amendment rights. The United States Supreme Court, in *Swain v. Alabama,* 380 U.S. 202, 222-23 (1965), held that there is a presumption that in any particular case the prosecutor used his peremptory challenges to obtain a fair and impartial jury. That presumption is negated only by a showing that the prosecutor used his peremptory challenges to systematically exclude black jurors. This systematic exclusion must be based on more than a single case where the peremptory challenges were so used. *Id.* The Eighth Circuit has followed the rule of law established in *Swain. See United States v. Childress,* 715 F.2d 1313 (8th Cir. 1983); *United States v. Thompson,* 730 F.2d 82, 85 (8th Cir. 1984); *United States v. Rose,* 731 F.2d 1337, 1347 n. 4 (8th Cir. 1984). Petitioner has offered no evidence of exclusion of blacks from jury panels in any case other than his own. He, therefore, has failed to meet the burden of *Swain.*

The petitioner's sixth ground for habeas corpus relief asserts that his conviction was not based on sufficient evidence. He contends that his motion for verdict of acquittal was denied in violation of his Fifth and Fourteenth Amendment rights. Federal habeas corpus relief is available if the record shows that no rational trier of fact could have found guilt beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307, 324 (1979); *Lenza v. Wyrick,* 665 F.2d 804, 812 (8th Cir. 1981). The decision

of the state court is not conclusive, but is entitled to great weight in the state court if the state court invokes the proper standard. *Jackson v. Virginia, supra,* 443 U.S. *at* 322; *Lenza v. Wyrick, supra,* 665 F.2d *at* 812.

The Supreme Court of Missouri viewed the evidence in the light most favorable to the state. *State of Missouri v. Garrett, supra,* 627 S.W.2d *at,* 642-43. It gave circumstantial and direct evidence equal weight. It considered inferences which could be drawn from the evidence tending to prove petitioner's guilt and disregarded contrary inferences. *Id.* This standard was approved in *Lenza v. Wyrick, supra.*

After reviewing the record in this case the undersigned finds that the evidence, viewed in the light most favorable to the prosecution, is constitutionally sufficient to support the verdict. The victim, Agnes Grote, was killed in the morning of April 3, 1977. Her body was discovered in her burning home by firemen. She had been struck on the head and stabbed in the neck. The investigation indicated that she was killed prior to the fire, that a storm door was pryed off its hinges with a screwdriver, that glass in the storm door and glass above a dead bolt lock on an inner door had been broken, and that an army-type bootprint was found in the yard near a usually unused door. Petitioner lived four houses from the victim. He was arrested, glass fragments were removed from the soles of his boots, and four screwdrivers were seized from his home. One of the screwdrivers was of the kind [issued] to petitioner at a technical school. The state forensic chemist testified that the bootprint outside the victim's home and the boots seized from petitioner had similar characteristics. (Resp. Exh. A-3, 697.) He found no difference in size and tread angle between the bootprint and petitioner's boots. (*Id., at* 670.) The trial evidence also indicated that the

glass fragments taken from petitioner's boots were "scientifically indistinguishable" from glass taken from the broken pane of the victim's inner door. (*Id., at* 738.) Another expert testified that the pry marks left on the victim's door were made by the technical school screwdriver found in petitioner's residence. (*Id., at* 839, 841, 843.) From this evidence a rational trier of fact could find petitioner guilty.

Petitioner's seventh gound for relief alleges that he was denied a fair trial by prejudicial statements made by the prosecutor in his closing arguments. The scope of review of due process claims by federal courts in habeas corpus petitions is narrow. *Donnelly v. DeChristoforo,* 416 U.S. 637, 642 (1974). The petitioner must show that the prosecutor's remarks were so egregious that they fatally infected the proceedings and rendered his entire trial fundamentally unfair. *Id.; Moore v. Wyrick,* 760 F.2d 884, 886 (8th Cir. 1985). More currently the Supreme Court has held that a reviewing court must assess the probable effect the prosecutor's statements would have on the jury, in the context in which they were made. *United States v. Young,* ..... U.S. ....., 105 S.Ct. 1038, 1044-1045 (1985).

Petitioner directs the Court's attention to several instances of improper argument. First, in the opening portion of argument, after recounting the evidence and inferences in the case, the prosecutor anticipated the argument of the defense counsel. He said "They have to do something - lawyers try and confuse the evidence the best they can —." An objection was sustained. (Exh. A-5, 55.) Although improper, this statement was brief and would not have distracted the jury from their proper task. Later, the prosecutor argued that the petitioner had a fair trial, but that the victim "didn't have years to prepare her defense. She didn't have several lawyers around her to

protect her. She didn't even have a trial. He was her judge and her jury. He sentenced her to death in the worst way possible." (Exh. A-5, 96.) Nothing in this statement was prejudicially inflammatory and the trial court overruled the objection. The jury knew the killing occurred several years before the trial and that petitioner had the services at trial of two attorneys. The jury could be expected to believe the petitioner spent much of the time after his arrest preparing for the trial. The focus of the argument was not any impropriety in the petitioner's constitutional safeguards but the manner in which the petitioner arguably killed the victim. It was not prejudicial enough to deny him a fair trial.

Finally, petitioner refers to the near-closing statement of the prosecutor referring to the petitioner sitting in the courtroom surrounded by his defense team personnel. (*Id.*, [*at*] 96-97.) An objection to the statement was sustained. Although improper as a reference to the defense personnel, the statement in context asked the jury to remember petitioner as the evidence of the crime portrayed him, not how he appeared in the courtroom. This statement did not deprive him of a fair trial.

Petitioner's final ground for relief is that he was deprived of a fair and impartial jury by the refusal of the trial court to strike a juror for cause. During the voir dire examination, venireman No. 59 stated he could follow the law and afford petitioner the presumption of innocence. (Exh. A-1, 236.) Later, the venireman stated that from reading the newspaper he had feelings "that perhaps the Courts are a little too lenient." (*Id.*) Further, he stated that, if all things were equal, he "would tend to lean towards the law side or the police side rather than the other." (*Id., at* 237.) Later, he testified he could set aside any of his preconceived notions, listen to the evidence, and be

guided by the instructions. (*Id., at* 239.) If the state failed to prove its case beyond a reasonable doubt, he testified he would acquit. (*Id.*) The trial court overruled the motion to strike this venireman for cause as biased.

The United States Supreme Court in *Patton v. Yount,* ..... U.S. ....., 104 S.Ct. 2885, 2891-2892 (1984), held that the question of whether a juror is biased is one of fact. As such, the finding of the state trial judge should be afforded deference in federal habeas proceedings. 28 U.S.C. §2254(d) (1983). The decision of the trial judge that the juror in question could decide the case impartially is supported by the record.

RECOMMENDATION

For the above-stated reasons, it is the recommendation of the undersigned United States Magistrate that this petition for a writ of habeas corpus be dismissed. The parties are advised that they have eleven (11) days in which to file written objections to this Report and Recommendation.

/s/ David D. Noce
United States Magistrate

Dated this 31st day of December, 1985.

APPENDIX B

(Filed March 6, 1986)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

GERALD DUANE GARRETT, Petitioner,	)	
v.	)	No. 85-0152C(3)
TERRY MORRIS, et al., Respondents.	)	

ORDER

This matter is before the Court on the petition of Gerald Duane Garrett for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The action was referred to United States Magistrate David D. Noce pursuant to 28 U.S.C. § 636(b). The Magistrate filed his Report and Recommendation on December 31, 1985, to which petitioner has filed his objections. After full consideration of the entire record,

IT IS HEREBY ORDERED that petitioner's objections be and the same are overruled.

IT IS HEREBY FURTHER ORDERED that the Report and Recommendation of the United States Magistrate be and the same is sustained, adopted, and incorporated herein.

IT IS HEREBY FURTHER ORDERED that the petition of Gerald Duane Garrett for writ of habeas corpus be and the same is denied.

Dated this 6th day of March, 1986.

/s/ (Illegible)
United States District Judge

APPENDIX C

Gerald Duane GARRETT,
Appellant,

v.

Terry MORRIS and Attorney General
of the State of Missouri,
Appellees.
No. 86-1481.

United States Court of Appeals,
Eighth Circuit.
Submitted Jan. 15, 1987.
Decided April 3, 1987.

Petition for writ of habeas corpus was filed to obtain relief from murder conviction based on prosecutor's allegedly discriminatory use of peremptory challenges to exclude all black prospective jurors. The United States District Court for the Eastern District of Missouri, William L. Hungate, J., denied petition. Petitioner appealed. The Court of Appeals, Arnold, Circuit Judge, held that: (1) prosecutor's volunteering of reasons for use of peremptory challenges to exclude black prospective jurors permitted review of prosecutor's decision to remove blacks from particular jury and eliminated presumption that prosecutor acted properly, and (2) prosecutor's stated reason for excluding black prospective jurors was pretext for race discrimination.

Reversed and remanded.

1. Jury (Key) 120, 121

Prosecutor's volunteering of reasons for use of peremptory challenges to exclude black prospective jurors permitted review of prosecutor's decision to remove blacks from particular jury, permitted proof of motives behind prosecutor's use of peremptory challenges to strike all black jurors, and eliminated presumption that prosecutor acted properly; disagreeing with *United States v. Danzey*, 476 F.Supp. 1065 (E.D.N.Y.). U.S.C.A. Const.Amends. 6, 14.

2. Jury (Key) 121

District court deciding challenge to prosecutor's use of peremptory challenges after prosecutor volunteers reasons for action and makes them part of record has duty to determine that prosecutor's challenges are based on constitutionally permissible, trial-related considerations and that proffered reasons are genuine and not pretext for discrimination. U.S.C.A. Const.Amends. 6, 14.

3. Habeas Corpus (Key) 45.3(1.40)

Petitioner, who presented facts bearing on challenge to prosecutor's use of peremptory challenges to exclude black prospective jurors and substance of constitutional arguments at every stage of litigation, even though he had not previously cited pertinent case from Ninth Circuit Court of Appeals, satisfied exhaustion requirements for pursuing habeas corpus relief and was not raising issue for first time on appeal, where relevant case was simply new citation in support of claim consistently urged throughout case. 28 U.S.C.A. § 2254; U.S.C.A. Const. Amend. 14.

4. Jury (Key) 33(5.1)

Prosecutor making jury selection was entitled to rely on information elicited by defense attorney.

5. Jury (Key) 121

Prosecutor's asserted reason for excluding all black prospective jurors, i.e., their lack of background, education, and knowledge to understand scientific evidence, was pretext for racial discrimination in light of decision not to strike white prospective jurors who differed in no significant way and, therefore, violated petitioner's equal protection rights, where two black jurors had high-school education, one black juror needed only three credits to complete college business degree, where two white jurors had not completed high school, where only two jurors selected had graduated from college, where one juror had associate degree from junior college, where remaining jurors had high-school education, and where no black prospective juror indicated partiality to defense. 28 U.S.C.A. § 2254(d)(8); U.S.C.A. Const.Amend. 14.

Toby H. Hollander, St. Louis, Mo., for appellant.

Stephen D. Hawke, Asst. Atty. Gen., Jefferson City, Mo., for appellees.

Before LAY, Chief Judge, HEANEY and ARNOLD, Circuit Judges.

ARNOLD, Circuit Judge.

This is an appeal from an order of the District Court denying Gerald Duane Garrett's 28 U.S.C. § 2254 petition for a writ of habeas corpus. Garrett argues, among other things, that the State's exercise of its peremptory challenges to exclude all black jurors from the petit jury panel at his murder trial violated his Sixth and Fourteenth Amendment rights. Because the record in this case demonstrates that the prosecutor used his peremptory challenges in an impermissibly discriminatory manner, we

hold that Garrett's constitutional rights were violated. Accordingly, we reverse the judgment of the District Court and grant Garrett's petition for habeas corpus relief.

I.

Garrett, who is black, was charged with capital murder in connection with the 1977 death of an elderly woman, Agnes Grote. He was tried in May 1980 in St. Louis County Circuit Court. Following a lengthy voir dire examination of prospective jurors, the prosecutor utilized three of his peremptory challenges to exclude the only three black venirepersons from the petit jury panel. When the defense moved for a mistrial on the ground that the prosecutor's decision to strike those three jurors was based on improper racial considerations, the prosecutor volunteered the following explanation for his actions:

> I think the record should reflect that the fact that the three jurors were black was not my reason for striking them, but, instead, it was the background, education and knowledge to understand fairly sophisticated scientific evidence which I intend to bring to the jury in this case.

Tr. II at 295. Thereupon, the trial judge denied the motion for a mistrial, stating, "I have no evidence before me to indicate the prosecutor chose to make his challenges except as he thought to be appropriate under all the facts developed by the voir dire." *Id.*

Garrett was subsequently convicted of first-degree murder, and sentenced to life imprisonment. The Missouri Supreme Court affirmed his conviction and sentence on direct appeal. *State v. Garrett*, 627 S.W.2d 635 (Mo.) (en banc), *cert. denied*, 459 U.S. 906, 103 S.Ct. 208, 74 L.Ed.2d 166 (1982). Garrett then filed the present habeas

corpus petition asserting multiple grounds for relief,[1] including the claim that the State's use of its peremptory challenges to exclude all black jurors from his petit jury panel deprived him of his Fourteenth Amendment right to equal protection of the laws, and his Sixth Amendment right to a jury chosen from a fair cross-section of the community. The District Court, adopting the report and recommendation of the United States Magistrate to whom the matter had been referred, rejected Garrett's claims and denied the petition. This appeal followed.

II.

Garrett's claim that the prosecutor's use of peremptory challenges violated his right to equal protection of the laws is governed by *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965). In *Swain*, the Supreme Court recognized that "a State's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause." *Id.* at 203-04, 85 S.Ct. at 826. Under *Swain*, a defendant can make out a prima facie case of purposeful discrimination on proof that the prosecutor perverted the peremptory-challenge system by using his challenges "to exclude blacks from the jury 'for reasons wholly unrelated to the outcome of the particular case on trial,' or to deny to blacks 'the same right and opportunity to participate in the administration of justice enjoyed by the white population.'" *Batson v. Kentucky*, ... U.S. ....., 106 S.Ct. 1712, 1720, 90 L.Ed.2d 69 (1986), *quoting Swain*, 380 U.S. at 224, 85 S.Ct. at 838. *Swain* nevertheless does not require an inquiry into a prosecutor's reasons for exercising his

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1. Garrett's § 2254 petition contained eight grounds for relief. He reasserts six of those claims on appeal. Because of our disposition of the jury-selection issue, we need not reach his other contentions.

challenges in any particular case, holding instead that a presumption exists that the prosecutor is using the State's challenges to obtain a fair and impartial jury. 380 U.S. at 222, 85 S.Ct. at 837. That presumption may be overcome by showing that the prosecution has systematically excluded blacks from petit juries over a period of time, *id.* at 223-24, 85 S.Ct. at 837-38, but a defendant cannot, under *Swain*, establish an equal-protection violation "solely on proof of the prosecutor's use of peremptory challenges to strike black jurors at the defendant's own trial." *Griffith v. Kentucky*, ... U.S. ....., 107 S.Ct. 708, 710, 93 L.Ed.2d 649 (1987).

Swain was overruled in part in *Batson v. Kentucky*, in which the Supreme Court held that a defendant "may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial." 106 S.Ct. at 1722-23. Garrett concedes, however, that the ruling in *Batson* does not apply retroactively to a case on federal habeas review. See *Allen v. Hardy*, ... U.S. ....., 106 S.Ct. 2878, 92 L.Ed.2d 199 (1986) (per curiam). Moreover, he has made no attempt to show the prosecution's systematic exclusion of black jurors from petit jury panels over time. Garrett nevertheless maintains that the record establishes a violation of the equal-protection principles of *Swain*,[2] and is sufficient

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2. As noted earlier, Garrett also argues that the prosecutor's actions violated his Sixth Amendment right to an impartial jury drawn from a fair cross-section of the community. This Court has repeatedly held that there is no Sixth Amendment exception to the equal protection analysis of *Swain*. See, *e.g.*, *United States v. Childress*, 715 F.2d 1313, 1318 (8th Cir.1983) (en banc), *cert. denied*, 464 U.S. 1063, 104 S.Ct. 744, 79 L.Ed.2d 202 (1984). Although Garrett urges us to abandon that position in the face of *Batson*, we decline to consider this request. Relief is being granted on equal-protection grounds, and it is not necessary to consider separately Garrett's Sixth Amendment theory.

to overcome the presumption protecting the prosecutor in this case. We agree.

[1, 2] The decision in *Swain* does not completely insulate a prosecutor's use of peremptory challenges in a given case. Although the Supreme Court declined to require an inquiry into a prosecutor's decision to remove blacks from a particular jury, we believe that where, as here, the prosecutor volunteers the reasons for his actions and makes them part of the record, he opens the issue up for review. The record is then no longer limited solely to proof that the prosecutor has used his peremptory challenges to strike all black jurors from the defendant's jury panel, and the presumption that the prosecutor has acted properly falls away. At that point, the court has a duty to satisfy itself that the prosecutor's challenges were based on constitutionally permissible trial-related considerations, and that the proffered reasons are genuine ones, and not merely a pretext for discrimination.

[3] The Ninth Circuit employed precisely this analysis in *Weathersby v. Morris*, 708 F.2d 1493 (9th Cir.1983), *cert. denied*, 464 U.S. 1046, 104 S.Ct. 719, 79 L.Ed.2d 181 (1984), another § 2254 habeas corpus case involving a prosecutor's use of peremptory challenges to exclude all black persons from the petit jury panel. In response to defendant Weathersby's objections, the prosecutor volunteered his reasons for exercising his challenges against the various black venirepersons. The Ninth Circuit noted that where, as in *Swain*, the prosecutor does not volunteer his reasons for exercising peremptory challenges, the defendant wishing to establish an equal protection violation bears the heavy burden of showing that the prosecution has systematically used such challenges to exclude blacks over a period of time. *Id.* at 1495-96. However,

> [c]ases where the prosecutor at trial volunteers his or her reasons for using peremptory challenges to

> exclude from the petit jury an identifiable group, present a situation distinguishable from *Swain*. In such cases, the court does not conduct the type of inquiry barred by *Swain*. The prosecutor's motives have been voluntarily put on the record and the prosecutor can no longer be cloaked by the presumption of correctness. Our reading of *Swain*, convinces us that in such circumstances a court need not blind itself to the obvious and the court may review the prosecutor's motives to determine whether "the purposes of the peremptory challenge are being perverted," *Swain*, 380 U.S. at 224, 85 S.Ct. at 838, by excluding an identifiable group "from juries for reasons wholly unrelated to the outcome of the particular case on trial." *Id.*

Id. at 1496.[3] The Court then reviewed the record to determine whether the prosecutor's volunteered reasons for exercising his peremptory challenges were, in fact, based on permissible trial related concerns, and concluded that the challenges were proper in the context of that particular case.

The Ninth Circuit stated in *Weathersby* that its approach to the issue had been suggested by our decision in *United States v. Greene*, 626 F.2d 75 (8th Cir.), *cert.*

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3. We reject the State's claim that Garrett may not rely on a "*Weathersby* theory" of relief because that theory was not litigated before the Missouri courts, and therefore does not satisfy the exhaustion requirements of § 2254, and because that theory was not presented to the District Court and thus may not be raised for the first time on appeal. Both the facts bearing on Garrett's jury selection claim, and the substance of his constitutional arguments concerning that claim have been presented to the courts at every stage of this litigation. The fact that the *Weathersby* case may not have been previously cited is immaterial. *Weathersby* is not a new "theory" of relief; it is simply a new citation in support of a claim consistently urged throughout this case.

denied, 449 U.S. 876, 101 S.Ct. 220, 66 L.Ed.2d 98 (1980). In *Greene*, the prosecutor used five of his six peremptory challenges to remove all prospective black jurors from the jury panel. This Court recognized that, under *Swain*, a prosecutor's decision to use his peremptory challenges to strike all black persons from a particular jury will be presumed proper *unless the record reveals that he made the challenges for impermissible reasons. Id.* at 76 (emphasis added). Because the record in *Greene* did not reveal whether the prosecutor excluded the five black jurors for permissible or impermissible reasons, the Court concluded that the record was insufficient to justify relief. *Id.* See also *United States v. Boykin*, 679 F.2d 1240, 1245 (8th Cir.1982) (no reversible error where record contained no facts from which to deduce that the prosecutor's exercise of peremptory challenges to exclude the only two blacks on the venire panel was for an impermissible reason).

The Ninth Circuit has stressed the importance of the prosecutor's voluntarily making the reasons for his peremptory challenges part of the record. See *United States v. Rabb*, 752 F.2d 1320, 1325 (9th Cir.1984), *cert. denied*, 471 U.S. 1019, 105 S.Ct. 2027, 85 L.Ed.2d 308 (1985) (court bound by presumption that the prosecutor's motives for excluding black jurors were acceptable where trial judge asked prosecutor to state his reasons, and prosecutor did not voluntarily place the reasons for his peremptory challenges in the record).[4] This Court has, however, con-

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4. *But see United States v. Danzey*, 476 F.Supp. 1065, 1067 (E.D.N.Y. 1979), *aff'd*, 620 F.2d 286 (2d Cir.), *cert. denied*, 449 U.S. 878, 101 S.Ct. 225, 66 L.Ed.2d 101 (1980) (*Swain* read as completely barring review of prosecutor's motives for exercising challenges, even where prosecutor volunteers an explanation). We agree with the Ninth Circuit that *Swain* should not be read

(Continued on following page)

sidered a prosecutor's reasons for excluding blacks even where those reasons were offered in response to an inquiry by the court. For instance, in *United States v. Andrade,* 788 F.2d 521 (8th Cir.), *cert. denied,* ..... U.S. ....., 107 S.Ct. 462, 93 L.Ed.2d 408 (1986), the defendants moved for a mistrial after the prosecutor peremptorily struck all prospective black jurors. The District Court took the motion under submission, and requested briefs and affidavits on the matter. After reviewing the submissions, including an affidavit from the prosecutor in which he stated his reasons for striking each black person from the jury panel, the District Court denied the defendants' motion.

On appeal, the defendants claimed that the District Court erred in failing to grant a mistrial, because the prosecutor had intentionally excluded blacks from the jury in violation of their Sixth and Fourteenth Amendment rights. They argued that the *Swain* requirement of establishing the systematic exclusion of blacks did not apply because the prosecutor had stated the reasons for his actions on the record, and suggested that this Court should, in any event, reconsider the law of peremptory challenges in light of recent developments in the area.[5] The Court declined the invitation to re-examine the law, but carefully reviewed the prosecutor's explanation for

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Footnote continued—

so broadly. Indeed, Justice White, the author of *Swain,* indicated as much in a footnote to his concurring opinion in *Batson,* in which he stated that it would not have been inconsistent with *Swain* "for the trial judge to invalidate peremptory challenges of blacks if the prosecutor, in response to an objection to his strikes, stated that he struck blacks because he believed they were not qualified to serve as jurors, especially in the trial of a black defendant." *Batson,* 106 S.Ct. at 1725 n.* (White, J., concurring).

5. *Batson v. Kentucky* was then pending before the United States Supreme Court.

striking the black jurors in light of the record in the case. We found clear support in the record for the government's claim that the prosecutor's challenges were exercised for permissible trial-related concerns rather than race, and therefore concluded that the defendants' constitutional rights had not been violated.[6]

In the present case, even assuming that the prosecutor had no duty to justify his actions under *Swain*, by volunteering his reasons for striking the black jurors, he made those reasons part of the record subject to our review. He is no longer "cloaked by the presumption of correctness," and we may review his motives "to determine whether 'the purposes of the peremptory challenge are being perverted.'" *Weathersby*, 708 F.2d at 1496 (quoting *Swain*, 380 U.S. at 224, 85 S.Ct. at 838).

As noted earlier, the prosecutor merely offered a blanket assertion that all three excluded black jurors lacked the "background, education and knowledge" to understand the scientific evidence he intended to present. The record reveals, however, that the prosecutor's questions to the assembled venire focused mainly on prior jury service, acquaintance with prospective witnesses, past association or involvement with the criminal-justice

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6. See also *United States v. Jackson*, 696 F.2d 578, 593 (8th Cir.1982), *cert. denied*, 460 U.S. 1073, 103 S.Ct. 1531, 75 L.Ed.2d 952 (1983) (government's response to District Court's inquiries about each peremptory strike exercised against a black venireman clearly showed the government did not exercise its challenges improperly). *But cf., United States v. Thompson*, 730 F.2d 82, 84-85 (8th Cir.), *cert. denied*, 469 U.S. 1024, 105 S.Ct. 443, 83 L.Ed.2d 369 (1984) (defendant's claim that government violated his constitutional rights by using peremptory challenges to remove almost all blacks from the jury panel in the belief they would be more sympathetic to defendant's designated black alibi witnesses rejected in the face of the holding in *Swain* that use of peremptory challenges to remove all black jurors from the jury panel in a single case will not support a claim of racial discrimination).

system, knowledge or information about the case, and past area of residence. It was defense counsel who demonstrated concern with the education and background of the prospective jurors.

[4, 5] The prosecutor was, of course, entitled to rely on information elicited by defense counsel in making his jury selection. Even so, his proffered explanation does not withstand scrutiny. All three prospective black jurors had at least a high-school education, and one needed only three additional hours of credit to complete a college business degree. Among the white jurors remaining on the panel, two had not completed high school, and two others never specified the extent of their education (one explained only that he had been a factory worker for thirty-two years, and the other stated that he had been working as an electrician since he was seventeen years old). Only two of the jurors selected had been graduated from college; a third had an associate degree from a junior college; and the remaining jurors had a high-school education. It is thus difficult to credit the prosecutor's statement that he struck the black jurors on the ground that they "lacked education."

Indeed, the record of voir dire reveals no quality of education, experience, or background characteristic only of the black jurors other than race. Nor did the three black jurors appear to have much in common with one another except race: they were of different sexes, were engaged in different occupations,[7] and apparently lived in different areas in St. Louis County. None expressed any views in-

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7. Two were male, one was female. One worked at Blue Shield as a clerk; another was a welder who had worked at General Motors for twenty-seven years; the third had been employed as an employee benefit representative at McDonnell-Douglas for twelve years.

dicating partiality to the defense. In fact, one stated that he found the nature of the crime (the brutal murder of an elderly woman) to be particularly distasteful, Tr. II at 155, suggesting if anything an attitude favorable to the prosecution. Furthermore, we can discern from the record no indication that the black jurors had any difficulty understanding or responding to questions which set them apart from white jurors who remained on the jury panel. And yet, in offering an explanation for rejecting the black jurors, the prosecutor lumped them together as a group rather than treating them as individuals. The trial court's immediate acceptance of that explanation at face value compounds our concern about the adequacy and genuineness of the proffered explanation.

In short, the reasons volunteered by the prosecutor are simply not fairly supported by the record. Therefore, the state court's implicit factual finding that the prosecutor had no impermissible motive is not entitled to any presumption of correctness. See 28 U.S.C. § 2254(d)(8). The prosecutor's rationale—the blacks' purported lack of education, background, and knowledge—seems clearly pretextual in light of his decision not to strike white jurors who differed in no significant way. Nor can we discern from the record any other legitimate trial-related reasons for striking all three black jurors. Despite the prosecutor's disclaimer of racial motives, it appears that he was in effect excluding the blacks from the petit jury in this case in the belief that, as blacks, they were not qualified to serve as jurors in the trial of this black defendant. See *Batson*, 106 S.Ct. at 1725 n.* (White, J., concurring). In the circumstances, we are constrained to conclude that the proffered explanation was a pretext for purposeful discrimination, and that Garrett's constitutional rights were violated.

Accordingly, we reverse the judgment of the District Court, and remand this matter with directions to grant the petition for a writ of habeas corpus if the State does not begin new trial proceedings within such reasonable period as the District Court may fix.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Gerald Duane Garrett,	)	
Appellant,	)	
vs.	)	No. 86-1481EM
Terry Morris, et al.,	)	
Appellees.	)	

Appeal from the United States District Court
for the Eastern District of Missouri.

Appellant's petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

May 29, 1987

Order entered at the Direction of the Court:

/s/ Robert D. St.Vrain
Clerk, U. S. Court of Appeals,
Eighth Circuit.

APPENDIX E

* * *

[294] (The following was at the Bench, outside the hearing of the jury):

MR. TILSEN: I wanted to bring this motion to the attention of the Court in chambers. Things happened so quick, I didn't. I noticed among the panel of thirty jurors we had for selection there were three black jurors. There were only three. The defendant is black. The State has chosen to strike all three black jurors. And the Court has now impaneled an all-white jury. I believe that the selection decision to strike those three black jurors by the State was made on the apparent basis of race, and race alone. There was nothing in any answers to any of their questions could have possibly formed a basis other than race, and race alone. And I believe it was misconduct on the part of the State to exercise the discretion given to it in this fashion. We, therefore, move for a mistrial on the basis of the State's exercise of its preemptory challenges in such a fashion—

[295] THE COURT: We have a problem with one of the jurors.

(The following was in open court, within the hearing of the jury:)

THE COURT: We will be in recess.

(Thereupon, the jury left the courtroom, and the following proceedings were had in open court, outside the presence and hearing of the jury:)

THE COURT: Do you want to finish?

MR. TILSEN: I think I have finished my motion.

MR. GOLDMAN: I think the record should reflect the fact that the three jurors were black was not my reason for striking them, but, instead, it was the background, education and knowledge to understand fairly sophisticated scientific evidence which I intend to bring to the jury in this case.

THE COURT: Very well. My view is, unless you have some evidence to substantiate—number one, I gather you are objecting to the fact that there are only three on the panel—

MR. TILSEN: And to Mr. Goldman exercising—

THE COURT: To take them in the order—unless you have some evidence to support there was something improper about their selection, I will deny that motion, and deny the other motion—I have no evidence before me to indicate the prosecutor chose to make his challenges except as he thought to be appropriate under all the facts developed by the voir dire. [296] We will be in temporary recess.

* * *

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

GERALD GARRETT,	)	
Petitioner,	)	
vs.	)	No. 86-1481EM
TERRY MORRIS,	)	
Respondent.	)	

AFFIDAVIT

Steven H. Goldman, being duly sworn, deposes and says that:

I, Steven H. Goldman, represented the State of Missouri in the trial of Gerald Garrett herein. I still hold the position of Assistant Prosecuting Attorney for St. Louis County, Missouri. It has come to my attention that this Court has raised concern in oral argument as to my reasons for striking three black jury panelists in this case. I was aware at the time of trial that the State did not have to justify peremptory strikes so I did not give my full reasoning at that time. It should be clear from the extensive questioning during voir dire by myself and defense counsel that I was concerned with many factors in jury selection such as past jury service, association with the criminal justice system, and location and permanence of residence. I was concerned with the extent and nature of questioning of the panelists and many additional factors. While this case was pending, a "committee to free Gerald Garrett" handed out extensive literature and displayed signs indicating that Gerald Garrett was charged because of his race. The record indicates that the defense was a police "frame." I was concerned that the black panelists would

be subjected to pressure and annoyance in their travels around the courthouse for what I anticipated to be a very lengthy trial.

I did not see the need to place all of my reasons for jury selection in the record at the time of trial. I could not accurately foresee the effect of changes in the law years later. The purpose of my limited stated reason was simply to assure the Court of my motivation by listing one important factor. I did not intend, and I hope I am not now bound by, detailed scrutiny of my statement at this time. I could have made no response. However, I felt, and still do, that this is an important issue and a record should be made. If given the opportunity, I will make a detailed list of reasons for my strikes.

/s/ Steven H. Goldman
Steven H. Goldman
Assistant Prosecuting Attorney
St. Louis County, Missouri
7900 Carondelet
Clayton, MO 63105
(314) 889-2600

(Seal)

Sworn and subscribed before me this 6 day of April, 1987.

/s/ Richard C. Koenig
Richard C. Koenig
Notary Public State of Missouri
St. Louis County
My Commission Exp. Sept 19, 1990

A copy of the foregoing was mailed to Toby Hollander, Attorney for Petitioner, on this 6 day of April, 1987.

/s/ Steven H. Goldman